

AMENDED IN ASSEMBLY APRIL 23, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 1730

Introduced by Assembly Member Wagner

February 14, 2014

An act to amend Section 2944.7 of, and to add Sections ~~2944.8, 2944.9, 2944.8~~ and 2944.10 to, the Civil Code, relating to mortgages.

LEGISLATIVE COUNSEL'S DIGEST

AB 1730, as amended, Wagner. Mortgage loan modification.

Existing law, applicable to residential mortgages, prohibits a person who negotiates, arranges, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation from, among other things, demanding or receiving any compensation until every service that the person contracted to perform or represented that he or she would perform is accomplished. Existing law makes a violation of these provisions by a natural person a misdemeanor punishable by a specified fine or imprisonment, or both.

This bill would authorize a violation of these provisions to be punished as a felony with imprisonment, as specified. By changing the definition of a crime, the bill would impose a state-mandated local program.

This bill would also ~~prohibit any person who engages in mortgage loan modification from accepting payment for services in advance of the loan modification approval. The bill would assess~~ *require the assessment of* civil penalties for ~~various related violations~~ *a violation of these provisions* and would authorize designated state and local government officials to commence civil actions to recover those penalties. ~~The bill would specify the manner of distribution of penalties recovered and would establish the Mortgage Loan Modification Fraud~~

~~Account in the General Fund for deposit of funds payable to the state, to be available for expenditure upon appropriation by the Legislature.~~

This bill would, in addition to the civil penalties described above, authorize further civil penalties for unlawful or fraudulent mortgage modifications perpetrated against a senior citizen or disabled person, as defined, and provide criteria for the assessment of these additional penalties. The bill would authorize a court to order the offender to pay restitution to the senior citizen or disabled person, as specified.

~~This bill would also authorize the court to provide injunctive relief, and would provide that a person who intentionally violates an injunction prohibiting offering loan modification services for a fee under these provisions is subject to civil penalties. The bill would authorize designated state and local government officials to commence civil actions to recover those penalties, and would specify the manner of distribution of penalties recovered.~~

This bill would impose a 4-year statute of limitations for actions brought pursuant to these provisions.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2944.7 of the Civil Code is amended to
2 read:
3 2944.7. (a) Notwithstanding any other law, it shall be unlawful
4 for any person who negotiates, attempts to negotiate, arranges,
5 attempts to arrange, or otherwise offers to perform a mortgage
6 loan modification or other form of mortgage loan forbearance for
7 a fee or other compensation paid by the borrower, to do any of the
8 following:
9 (1) Claim, demand, charge, collect, or receive any compensation
10 until after the person has fully performed each and every service
11 the person contracted to perform or represented that he or she
12 would perform.

1 (2) Take any wage assignment, any lien of any type on real or
2 personal property, or other security to secure the payment of
3 compensation.

4 (3) Take any power of attorney from the borrower for any
5 purpose.

6 (b) A violation of this section by a natural person is punishable
7 by a fine not exceeding ten thousand dollars (\$10,000), by
8 imprisonment in the county jail for a term not to exceed one year,
9 or imprisonment pursuant to subdivision (h) of Section 1170 of
10 the Penal Code, or by both that fine and imprisonment, or if by a
11 business entity, the violation is punishable by a fine not exceeding
12 fifty thousand dollars (\$50,000). These penalties are cumulative
13 to any other remedies or penalties provided by law.

14 (c) ~~Any~~ *In addition to the penalties and remedies provided by*
15 *Chapter 5 (commencing with Section 17200) of Part 2 of Division*
16 *7 of the Business and Professions Code, a person who engages,*
17 ~~has engaged, or proposes to engage in the mortgage loan~~
18 ~~modification business who accepts a payment for the service in~~
19 ~~advance of the approval of the loan modification violates this~~
20 *section shall be liable for a civil penalty not to exceed twenty*
21 *thousand dollars (\$20,000) for each violation, which shall be*
22 *assessed and recovered in a civil action brought in the name of the*
23 *people of the State of California by the Attorney General, by any*
24 *district attorney, by any county counsel authorized by agreement*
25 *with the district attorney in actions involving violation of a county*
26 *ordinance, by any city attorney of a city having a population in*
27 *excess of 750,000, by any city attorney of any city and county, or,*
28 *with the consent of the district attorney, by a city prosecutor in*
29 *any city having a full-time city prosecutor, in any court of*
30 *competent jurisdiction pursuant to Chapter 5 (commencing with*
31 *Section 17200) of Part 2 of Division 7 of the Business and*
32 *Professions Code.*

33 (d) ~~A violation of this section shall be deemed a fraud upon the~~
34 ~~contracting parties and upon the state. A party described in~~
35 ~~subdivision (c) shall file a civil action for each individual violation~~
36 ~~of this section and shall recover the costs of investigation and~~
37 ~~prosecution. In assessing the amount of the civil penalty, the court~~
38 ~~shall consider any one or more of the relevant circumstances~~
39 ~~presented by any of the parties to the case, including, but not~~
40 ~~limited to, the following:~~

1 ~~(1) The nature and seriousness of the misconduct, the number~~
2 ~~of violations.~~

3 ~~(2) The persistence of the misconduct.~~

4 ~~(3) The length of time over which the misconduct occurred.~~

5 ~~(4) The willfulness of the defendant's misconduct.~~

6 ~~(5) The defendant's assets, liabilities, and net worth.~~

7 ~~(6) The amount taken from each complaining witness by the~~
8 ~~defendant individual.~~

9 ~~(e) If the action is brought by the Attorney General, one-half of~~
10 ~~the penalty collected shall be paid to the treasurer of the county in~~
11 ~~which the judgment was entered and one-half to the Mortgage~~
12 ~~Loan Modification Fraud Account, established by this section~~
13 ~~within the General Fund. If the action is brought by a district~~
14 ~~attorney or county counsel, the penalty collected shall be paid to~~
15 ~~the treasurer of the county in which the judgment was entered. If~~
16 ~~the action is brought by a city attorney or city prosecutor, one-half~~
17 ~~of the penalty collected shall be paid to the treasurer of the city in~~
18 ~~which the judgment was entered, and one-half to the treasurer of~~
19 ~~the county in which the judgment was entered. The funds described~~
20 ~~above shall be for the exclusive use by the Attorney General, the~~
21 ~~district attorney, the county counsel, and the city attorney for the~~
22 ~~enforcement of consumer protection laws.~~

23 ~~(f) The Mortgage Loan Modification Fraud Account is hereby~~
24 ~~created as an account within the General Fund in the State~~
25 ~~Treasury. The portion of penalties that is payable to the General~~
26 ~~Fund or to the Treasurer recovered by the Attorney General from~~
27 ~~an action or settlement of a claim made by the Attorney General~~
28 ~~pursuant to this chapter shall be deposited into this account.~~
29 ~~Moneys in this account, upon appropriation by the Legislature,~~
30 ~~shall be used by the Attorney General to support investigations~~
31 ~~and prosecutions of California's mortgage loan modification fraud,~~
32 ~~including implementation of judgments obtained from these~~
33 ~~prosecutions or investigations and other activities which are in~~
34 ~~furtherance of this chapter.~~

35 ~~(g) (1) If the action is brought at the request of a board within~~
36 ~~the Department of Consumer Affairs or a local consumer affairs~~
37 ~~agency, the court shall determine the reasonable expenses incurred~~
38 ~~by the board or local agency in the investigation and prosecution~~
39 ~~of the action and approve reimbursement of those expenses at the~~
40 ~~court's discretion.~~

~~(2) Before any penalty collected is paid out pursuant to subdivision (e), the amount of any reasonable expenses incurred by the board within the Department of Consumer Affairs or a local consumer affairs agency shall be paid to the Treasurer for deposit in the special fund of that board. If the board within the Department of Consumer Affairs or a local consumer affairs agency has no such special fund, the moneys shall be paid to the Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds that local agency.~~

~~(h)~~

~~(d) If the action is brought by the city attorney of the City and County of San Francisco, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered for the exclusive use by the city attorney for the enforcement of consumer protection laws.~~

~~(i)~~

~~(e) Nothing in this section precludes a person, or an agent acting on that person's behalf, who offers loan modification or other loan forbearance services for a loan owned or serviced by that person, from doing any of the following:~~

~~(1) Collecting principal, interest, or other charges under the terms of a loan, before the loan is modified, including charges to establish a new payment schedule for a nondelinquent loan, after the borrower reduces the unpaid principal balance of that loan for the express purpose of lowering the monthly payment due under the terms of the loan.~~

~~(2) Collecting principal, interest, or other charges under the terms of a loan, after the loan is modified.~~

~~(3) Accepting payment from a federal agency in connection with the federal Making Home Affordable Plan or other federal plan intended to help borrowers refinance or modify their loans or otherwise avoid foreclosures.~~

~~(j)~~

~~(f) This section shall apply only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units.~~

SEC. 2. Section 2944.8 is added to the Civil Code, to read:

2944.8. (a) In addition to any liability for a civil penalty pursuant to Section 2944.7, if a person violates this chapter Section

1 2944.7 with respect to a victim who is a senior citizen or a disabled
2 person, the violator may be liable for a civil penalty not to exceed
3 two thousand five hundred dollars (\$2,500) for each violation,
4 which may be assessed and recovered in a civil action.

5 ~~(b) Subject to subdivision (e), any civil penalty shall be paid as~~
6 ~~prescribed by subdivisions (b) and (c) of Section 2944.7.~~

7 ~~(e)~~

8 ~~(b)~~ As used in this section, the following terms have the
9 following meanings:

10 (1) “Disabled person” means a person who has a physical or
11 mental impairment that substantially limits one or more major life
12 activities disability, as defined in Sections 12926 and 12926.1 of
13 the Government Code.

14 ~~(2) “Major life activities” means functions that include caring~~
15 ~~for one’s self, performing manual tasks, walking, seeing, hearing,~~
16 ~~speaking, breathing, learning, and working.~~

17 ~~(3) “Physical or mental impairment” means any of the following:~~

18 ~~(A) A physiological disorder or condition, cosmetic~~
19 ~~disfigurement, or anatomical loss substantially affecting one or~~
20 ~~more of the following body systems: neurological, musculoskeletal,~~
21 ~~special sense organs, respiratory, including speech organs,~~
22 ~~cardiovascular, reproductive, digestive, genitourinary, hemie and~~
23 ~~lymphatic, skin, or endocrine.~~

24 ~~(B) A mental or psychological disorder, including intellectual~~
25 ~~disability, organic brain syndrome, emotional or mental illness,~~
26 ~~and specific learning disabilities.~~

27 ~~(C) Diseases and conditions including orthopedic, visual, speech~~
28 ~~and hearing impairment, cerebral palsy, epilepsy, muscular~~
29 ~~dystrophy, multiple sclerosis, cancer, heart disease, diabetes,~~
30 ~~intellectual disability, and emotional illness.~~

31 ~~(4)~~

32 (2) “Senior citizen” means a person who is 65 years of age or
33 older.

34 ~~(d)~~

35 (c) In determining whether to impose a civil penalty pursuant
36 to subdivision (a) and the amount thereof, the court shall consider,
37 in addition to any other appropriate factors, the extent to which
38 one or more of the following factors are present:

1 (1) Whether the defendant knew or should have known that his
2 or her conduct was directed to one or more senior citizens or
3 disabled persons.

4 (2) Whether the defendant's conduct caused one or more senior
5 citizens or disabled persons to suffer any of the following: loss or
6 encumbrance of a primary residence, principal employment, or
7 source of income, substantial loss of property set aside for
8 retirement, or for personal or family care and maintenance, or
9 substantial loss of payments received under a pension or retirement
10 plan or a government benefits program, or assets essential to the
11 health or welfare of the senior citizen or disabled person.

12 (3) Whether one or more senior citizens or disabled persons are
13 substantially more vulnerable than other members of the public to
14 the defendant's conduct because of age, poor health or infirmity,
15 impaired understanding, restricted mobility, or disability, and
16 actually suffered substantial physical, emotional, or economic
17 damage resulting from the defendant's conduct.

18 (e)

19 (d) A court of competent jurisdiction hearing an action pursuant
20 to this section may make orders and judgments as necessary to
21 restore to a senior citizen or disabled person money or property,
22 real or personal, that may have been acquired by means of a
23 violation of ~~this chapter Section 2944.7. Restitution ordered~~
24 ~~pursuant to this subdivision shall be given priority over recovery~~
25 ~~of a civil penalty imposed by the court pursuant to subdivision (a);~~
26 ~~but shall not be given priority over a civil penalty imposed pursuant~~
27 ~~to subdivision (e) of Section 2944.7. If the court determines that~~
28 ~~full restitution cannot be made to those senior citizens or disabled~~
29 ~~persons, either at the time of judgment or by a future date~~
30 ~~determined by the court, then restitution under this subdivision~~
31 ~~shall be made on a pro rata basis depending on the amount of loss.~~

32 SEC. 3. ~~Section 2944.9 is added to the Civil Code, to read:~~

33 2944.9. (a) In addition to any civil penalty imposed, the court
34 is authorized to provide injunctive relief in response to a violation
35 of Sections 2944.7 or Sections 2944.8

36 (b) ~~Any person who intentionally violates any injunction~~
37 ~~prohibiting offering loan modification services for a fee issued~~
38 ~~pursuant to Section 2944.7 shall be liable for a civil penalty not~~
39 ~~to exceed ten thousand dollars (\$10,000) for each violation. Where~~
40 ~~the conduct constituting a violation is of a continuing nature, each~~

1 day of that conduct is a separate and distinct violation. In
2 determining the amount of the civil penalty, the court shall consider
3 all relevant circumstances, including:

4 (1) The extent of the harm caused by the conduct constituting
5 a violation.

6 (2) The nature and persistence of that conduct.

7 (3) The length of time over which the conduct occurred.

8 (4) The assets, liabilities, and net worth of the person, whether
9 corporate or individual.

10 (5) Any corrective action taken by the defendant.

11 (e) The civil penalty prescribed by this section shall be assessed
12 and recovered in a civil action brought in any county in which the
13 violation occurs or where the injunction was issued in the name
14 of the people of the State of California by the Attorney General
15 or by any district attorney, any county counsel authorized by
16 agreement with the district attorney in actions involving violation
17 of a county ordinance, or any city attorney in any court of
18 competent jurisdiction within his or her jurisdiction without regard
19 to the county from which the original injunction was issued. An
20 action brought pursuant to this section to recover civil penalties
21 shall take precedence over all civil matters on the calendar of the
22 court, except those matters to which equal or greater precedence
23 on the calendar is granted by law.

24 (d) If an action is brought by the Attorney General, one-half of
25 the penalty collected pursuant to this section shall be paid to the
26 treasurer of the county in which the judgment was entered, and
27 one-half to the Treasurer. If brought by a district attorney or county
28 counsel the entire amount of the penalty collected shall be paid to
29 the treasurer of the county in which the judgment is entered. If
30 brought by a city attorney or city prosecutor, one-half of the penalty
31 shall be paid to the treasurer of the county in which the judgment
32 was entered and one-half to the city, except that if the action was
33 brought by a city attorney of a city and county the entire amount
34 of the penalty collected shall be paid to the treasurer of the city
35 and county in which the judgment is entered.

36 (e) If the action is brought at the request of a board within the
37 Department of Consumer Affairs or a local consumer affairs
38 agency, the court shall determine the reasonable expenses incurred
39 by the board or local agency in the investigation and prosecution
40 of the action.

1 Before any penalty collected is paid out pursuant to subdivision
2 (e), the amount of the reasonable expenses incurred by the board
3 shall be paid to the Treasurer for deposit in the special fund of the
4 board described above. If the board has no such special fund, the
5 moneys shall be paid to the Treasurer. The amount of the
6 reasonable expenses incurred by a local consumer affairs agency
7 shall be paid to the general fund of the municipality or county
8 which funds the local agency.

9 ~~SEC. 4.~~

10 *SEC. 3.* Section 2944.10 is added to the Civil Code, to read:

11 2944.10. Any action to enforce any cause of action pursuant
12 to Section ~~2944.7~~, *2944.7 or 2944.8*, ~~or 2944.9~~, shall be
13 commenced within four years after the cause of action accrued.
14 No cause of action barred under existing law on the effective date
15 of this section shall be revived by its enactment.

16 ~~SEC. 5.~~

17 *SEC. 4.* No reimbursement is required by this act pursuant to
18 Section 6 of Article XIII B of the California Constitution because
19 the only costs that may be incurred by a local agency or school
20 district will be incurred because this act creates a new crime or
21 infraction, eliminates a crime or infraction, or changes the penalty
22 for a crime or infraction, within the meaning of Section 17556 of
23 the Government Code, or changes the definition of a crime within
24 the meaning of Section 6 of Article XIII B of the California
25 Constitution.